No. 83-2161

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

STATE OF MONTANA, et al.,
Petitioners,

vs.

BLACKFEET TRIBE OF INDIANS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

STATUTES:

Federal

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This case presents important questions of federal law which have not been, but should be, settled now by this Court. The Blackfeet Tribe's brief in opposition presents analyses which purport to belittle the impact of this case and the significance of the question presented for review, not only as the case affects petitioners, but also as it affects other western states. See Brief of Arizona, Idaho, Nevada, and North Dakota as Amici

Curiae. At the same time, the Tribe takes positions contrary to petitioners on significant issues on which circuit courts are divided and which require resolution by this Court. Furthermore, the Tribe disputes some of the conclusions and reasoning of the Ninth Circuit's opinion, and presents what appears to amount to a cross petition for certiorari on some issues. Overall, the Tribe's positions emphasize, rather than diminish, the compelling reasons for granting certiorari in this case.

The Tribe argues first that this case is not ripe for review and that a decision by this Court in this case will not resolve the numerous cases pending in various courts where state taxes on oil and gas production on tribal lands are in question. The Tribe argues that the question presented here is limited and

unimportant.

In taking these positions, the Tribe ignores the fact that this case presents an important question of first impression for this Court. The petition cites the case of McClanahan v. Arizona Tax Commission, 411 U.S. 164, 177 n.16 (1973), as an indication that the issue presented here is an important one which remains unanswered by this Court. Pet. 23-27. The Tribe does acknowledge this discussion and citation by the State, but then misreads them as arguments by the State that this Court has already decided the issue in favor of the State. Tribe's Brief at 20. As the State's topic heading and the discussion in the petition make clear (Pet. at 21), McClanahan is cited and discussed for the purpose of showing that although this Court has paid attention to the important issue of states' powers to

tax mineral production on tribal lands under post-1938 leases, it has not yet decided that issue. Nothing in the Tribe's brief diminishes the import of the question presented for review.

In addition to ignoring the fact that the issue presented here is an important one of first impression for this Court, the Tribe insists that because it is challenging only the State's taxes imposed on tribal royalties, the outcome of this case will have no effect on the many pending cases which challenge taxes on the producers' interests as well as on tribal royalty interests. Tribe's Brief at 9-10. This position is absurd. It is obvious that the Ninth Circuit opinion, if left unreviewed, will affect pending cases and future cases filed before final disposition of this case. For example, in Crow Tribe of Indians v. State of Montana,

650 F.2d 1104 (9th Cir. 1981), modified, 665 F.2d 1390 (9th Cir. 1981), cert. denied, 459 U.S. 916 (1982), the post-trial brief of the Crow Tribe is replete with references to the Ninth Circuit opinion in the instant case. Furthermore, it is obvious that if, as a matter of law, the State and counties may impose their taxes on the Tribe's royalty share in this case, they can also tax the producers' share of production of oil and gas. Resolution of the pure legal question of whether or not the royalty share may be taxed certainly will determine the outcome of cases where the producers' shares are being taxed.

In a further attempt to minimize the impact and effect of the Ninth Circuit's decision, the Tribe states that this case presents a simple question of ordinary statutory interpretation that does not

require review by this Court. According to the Tribe, this simple question involves an interpretation of the meaning of the words "such lands" in the 1924 Act. Tribe's Brief at 10-11. The words "such lands" appear in a sentence in the 1924 Act which reads, "Provided, that the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands...." Act of May 29, 1924, 43 Stat. 244, 25 U.S.C. § 398, Pet. App. 152. The Tribe argues that "such lands" mean lands leased under the 1924 Act, so that only production from lands leased under the Act can be taxed by the State. This argument was not adopted by the Ninth Circuit. Moreover, the Tribe's argument is wrong. This Court has already considered the meaning of the words "such

lands" contained in the 1924 Act in British-American Oil Producing Company v. Board of Equalization, 199 U.S. 159 (1936). There, this Court held that "such lands" are "'unallotted land on Indian reservations,' other than lands of the Five Civilized Tribes and of the Osage Reservation, which are subject to lease for mining purposes" under a proviso of Section 3 of the Act of February 28, 1891. (Pet. App. 150.) That proviso reads: "Where lands are occupied by Indians who have bought and paid for the same, and which lands are not desired for individual allotments, the same may be leased by authority of the Council speaking for such Indians,..." Thus, "such lands" are simply unallotted lands on the Blackfeet Reservation, including minerals reserved for the benefit of the Blackfeet Tribe, regardless of the status of the surface

lands. British-American Oil Producing Company, supra, 299 U.S. at 164. The Tribe's suggestion that the instant case can be decided simply with a new interpretation of these two words, without reading the 1924 and the 1938 Acts together, is completely without foundation. The Tribe's argument for a simple resolution of this case by interpreting "such lands" as suggested is additionally weakened by the Tribe's own argument that the 1938 Act repealed the 1924 Act. Tribe's Brief at 7, 24-27.

The Tribe states that its argument that the 1938 Act repealed the 1924 Act is merely an alternate justification for the Ninth Circuit opinion. Tribe's Brief at 11 n.3. Yet before and after this disclaimer, the Tribe makes the argument that the "taxes are also impermissible because the act relied on by the state to

authorize the taxes was repealed by a later statute." Id. at 7. The Tribe on the one hand attempts to support the opinion of the Ninth Circuit that the 1924 Act was replaced, and on the other hand attempts to show that consistency with the policies of the Indian Reorganization Act and the 1938 Act's goal of bringing uniformity to the area of Indian mineral leasing compels the conclusion that the 1924 taxation authority was repealed. Although the Tribe has not filed a cross-petition for certiorari, it apparently does not subscribe to the Ninth Circuit's finding that the 1938 Act replaced the 1924 Act, and that the 1924 Act continues to be viable for leases executed prior to May 11, 1938. This dispute highlights the reasons for this Court's review of this case.

An additional reason for granting

certiorari is the need for this Court to give guidance to circuit courts of appeal as to what they should do when two statutes on the same subject exist, particularly in an area affecting Indians and Indian Tribes. As discussed in the petition for certiorari, there currently is a conflict among the circuits on what approach is correctly taken under the circumstances found in this case.

The Tribe at one point dismisses the State's discussion of cases on the interpretation of statutes when there are two statutes on the same subject, saying that the cases cited by the State, Nebraska Public Power District v. 100.95 Acres of Land in County of Thurston, 719 F.2d 956 (8th Cir. 1983), and Yellowfish v. City of Stillwater, 691 F.2d 926 (10th Cir. 1982), are irrelevant because they deal with statutory repeals. Yet the

Tribe itself elsewhere in its brief cites some cases in support of its view that there has been a repeal of the 1924 Act by the 1938 Act. Tribe's Brief at 25-27. Although the State does not necessarily agree that the Tribe's cases, Andrus v. Glover Construction Co., 446 U.S. 608 (1980), and Plains Elec. Gen. and Tr. Co-Op, Inc. v. Pueblo of Laguna, 542 F.2d 1375 (9th Cir. 1976), stand for the propositions for which they are cited, the Tribe's reliance on these cases and its interpretation of them is further support for petitioners' position that this Court should review this case and give guidance to the circuit courts of appeal on how to view two statutes dealing with the same subject.

In its attempt to bolster the Ninth Circuit's rationale that the Indian Reorganization Act's [hereinafter I.R.A.]

policies compel the conclusion that the leases made after 1938 are not subject to the taxation authority contained in the 1924 Act, the Tribe argues that the 1924 Act's taxation authority "conflicts with the purposes of the I.R.A. to promote tribal independence and economic power. See, 78 Cong. Rec. 11126-27 and 11173 (1934)." Tribe's Brief at 26. This is the Tribe's only citation purporting to set forth the purposes of the I.R.A. An examination of 78 Cong. Rec. 11126-27 reveals no such conflict. Those pages do contain Congress' discussion of the proposed I.R.A., including expressions of some concern about the need for tribal independence and power. However, the focus of Congress was clearly on the historic oppression of Indians by the Bureau of Indian Affairs bureaucracy and on the evils of the past allotment system.

Congress' concerns with correcting those problems are not in conflict in any way with the taxation authority in the 1924 Act. Page 11173 deals with resignations and appointments of postmasters throughout the United States, and apparently is a mis-citation. In short, the citation used by the Tribe as its primary evidence that the taxation authority in the 1924 Act conflicts with the purposes of the I.R.A. shows nothing relevant to this case. The Tribe's and the Ninth Circuit's misreliance on and misinterpretation of the I.R.A. and the policies point further to the need for review of this case by this Court.

This case presents an excellent opportunity for this Court to answer important questions of law which should be settled now, without having to address collateral questions of fact and law.

Review now would spare the parties the delay and expense of trial that would be required by the Ninth Circuit upon remand. Although the Tribe's brief asserts that the State's taxes interfere with the Tribe's economic independence and economy (Tribe's Brief at 1, 26), there are no allegations in the pleadings in this case of such an effect of these taxes. See First Amended Complaint of Blackfeet Tribe of Indians, Pet. App. 131. There is no evidence of such interference in the record. Also, the record is bare of allegations of, evidence on, or concern with the question of whether the taxes may have been pre-empted under the standards of Crow Tribe of Indians v. Montana, supra, if the tax incidence falls on the producers. The Tribe's unsubstantiated and belated allegations that the taxes at issue adversely affect the Tribe and

interfere with the Tribe's economic independence only emphasize the importance of ruling now on the question presented. The parties need a definitive answer from this Court. The question will not go away. Years of expensive litigation on collateral factual issues will not eliminate the necessity for this Court ultimately to answer the question presented here and now.

Nothing in the brief of the Blackfeet Tribe in opposition to the petition for certiorari diminishes the fact that this case is one of great importance which because of recurring litigation should be reviewed now by this Court. In addition, the case is important because it offers an opportunity for the Court to give guidance to the courts of appeal on what standards of construction should be used when two statutes deal with the same subject

matter. The petition for a writ of certiorari to the Ninth Circuit Court of Appeals should be granted.

Respectfully submitted,

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